

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO DOMINGUEZ,

Defendant and Appellant.

In re FRANCISCO DOMINGUEZ,

on Habeas Corpus.

H031795

(Santa Clara County
Super. Ct. No. CC645895)

ORDER MODIFYING OPINION
AND DENYING REHEARING

H032996

(Santa Clara County
Super. Ct. No. CC645895)

BY THE COURT:

It is ordered that the opinion filed herein on September 10, 2008, be modified as follows:

1. On page 1, delete the third sentence beginning “On appeal,” and replace with: “Defendant raises two arguments on appeal.
2. On page 1, delete the sixth sentence beginning “Defendant also argues,” and replace with: “Defendant also argues that he was deprived of due process of law when the trial court granted the prosecutor’s motion to amend the information and instructed the jury that it could find defendant guilty of an offense not shown by the evidence at the preliminary hearing.”
3. On page 1, delete the seventh sentence beginning “The Attorney General concedes” and replace with: “The Attorney General concedes the instructional error but argues that it was harmless.”

4. On page 8, delete the first full paragraph on that page and replace with: “At the close of all the evidence, the trial court allowed the prosecution to amend the information to extend the date range within which the crime was alleged to have occurred. The court then instructed the jury that it could find defendant guilty of vehicle theft or unauthorized use based upon either the October 9, 2006 incident in which defendant took the car and said that he had used it to visit his family or the incident in which the car disappeared overnight on October 16, 2006 and defendant was later seen driving it. Defendant claims that the instruction deprived him of his right to due process under the Sixth and Fourteenth Amendments of the United States Constitution and that the error is reversible per se. The Attorney General concedes that the instruction was improper but argues that it was harmless.”

There is no change in the judgment.

The Attorney General’s petition for rehearing is denied.

Dated: _____

Premo, Acting P.J.

Elia, J.

Bamattre-Manoukian, J.